STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2005
v	No. 250437 Wayne Circuit Court
MICHAEL BANKS MORGAN, Defendant-Appellant.	LC No. 03-001476-02

Before: Neff, P.J., and Cooper and R.S. Gribbs*, JJ.

COOPER, J. (*concurring in part and dissenting in part*).

I must disagree with the majority opinion of my colleagues. As I would find that the trial court improperly admitted evidence in violation of defendant's Sixth Amendment right to confront the witnesses against him and gave an erroneous accessory-after-the-fact jury instruction that likely affected the outcome of defendant's trial, I would vacate defendant's convictions and sentences and remand for a new trial.

I. Right of Confrontation

I agree with defendant's contention that the trial court improperly admitted statements made by Patrick Bates to Michael Broome regarding his role in the attempted robbery and murder. The trial court admitted the statements, which implicated defendant in planning the attempted robbery leading to the murder of Michael Connor, pursuant to MRE 804(b)(3) over defendant's pretrial objection. I agree with the majority opinion that *People v Poole*[1] was not overruled by federal case law. However, I would find the statements inadmissible as they lack adequate indicia of reliability. Without this evidence, the only charge of which defendant could be convicted is accessory after the fact,[2] an offense with which the prosecution failed to charge defendant. In light of the close nature of the evidence in this case, I would find that the erroneous admission requires the vacation of defendant's convictions and sentences.

[1] *People v Poole*, 444 Mich 151, 153-154; 506 NW2d 505 (1993).

[2] MCL 767.67.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In determining whether Mr. Broome's testimony regarding Mr. Bates' statements was improperly admitted under MRE 804(b)(3), this Court must first determine if the statements were inadmissible testimonial hearsay pursuant to *Crawford v Washington*.[3] Although "[t]he *Crawford* Court intentionally '[left] for another day any effort to spell out a comprehensive definition of "testimonial,"'"[4] the Court did give some guidance in determining what type of statements meet the definition.

> The text of the Confrontation Clause . . . applies to "witnesses" against the accused—in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
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> Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v Illinois*, 502 US 346, 365; 112 S Ct 736; 116 L Ed 2d 848 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, ex parte testimony at a preliminary hearing.[5]

The Sixth Circuit recently defined "testimonial" in even more detail. In *United States v Cromer*,[6] that court quoted the definitions proposed by Professor Richard Friedman of the University of Michigan Law School.

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[3] *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

[4] *People v Shepherd*, 263 Mich App 665, 674; 689 NW2d 721 (2004), quoting *Crawford*, *supra* at 1374.

[5] *Crawford*, *supra* at 1364.

[6] *United States v Cromer*, 389 F3d 662 (CA 6, 2004).

> Professor Friedman . . . urges a broader definition of "testimonial" that would include any statement "made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime." Friedman & McCormack, *Dial-in testimony*, 150 U Pa L Rev 1171, 1240-1241 (2002). Based on his proposed definition, Friedman offers five rules of thumb:
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> > A statement made knowingly to the authorities that describes the criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one's ordinary business, made before the criminal act has occurred or with no recognition that it relates to criminal activity. [Friedman, *Confrontation: the search for basic principles*, 86 Geo L J 1011, 1042-1043 (1998).]
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> We find the definition of "testimonial" proposed by Professor Friedman to be both well-reasoned and wholly consistent with the purpose behind the Confrontation Clause. . . .
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> . . . As explained by Professor Friedman . . . the broader definition "is necessary to ensure that the adjudicative system does not effectively invite witnesses to testify in informal ways that avoid confrontation." Friedman, *Confrontation*, 86 Geo L J at 1043.[7]

Here, Mr. Bates told a friend about his role in a murder. Mr. Bates made these statements more than a year later when a coparticipant began blackmailing him. These were not statements made to the authorities or made by the victim. They were made by one criminal participant to someone completely uninvolved in the offense. Mr. Bates would not have anticipated that his statements would later be used against him at trial. In fact, Mr. Broome testified that he only implicated Mr. Bates to the police to avoid prosecution following his own arrest on a completely unrelated drug charge.[8] Accordingly, I agree with the majority that Mr. Bates' statements to Mr. Broome were not testimonial under any current definition of the term.

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[7] *Id.* at 673-674.

[8] Mr. Broome testified that he was about to enter the military when he was arrested for selling ecstasy. He immediately told the police about Mr. Bates', and the other participants', role in the murder to avoid a charge that could affect his career.

The next step is to determine whether these nontestimonial statements were properly admitted pursuant to *Ohio v Roberts*,[9] and the Michigan cases of *Poole* and *People v Washington*.[10] The majority opinion succinctly discusses the various factors that this Court must analyze in determining whether a nontestimonial statement bears sufficient indicia of reliability to be admitted against a defendant.

It is clear from the record that Mr. Bates voluntarily made the challenged statements to Mr. Broome, an old friend, and the brother of his girlfriend. Mr. Bates did not minimize his role in Mr. Connor's murder. Although Mr. Bates implicated Eladio Nino and defendant by name as coparticipants in the planning and implementation of the attempted robbery, Mr. Bates admitted that he shot Mr. Connor in the head. However, the statements were not contemporaneous with the charged offense. Mr. Bates did not tell Mr. Broome of his involvement in the attempted robbery and murder until more than a year after those events. The only reason Mr. Bates broke his silence was his distress at being blackmailed, an event which occurred only upon the instigation of law enforcement. Furthermore, it is unclear from Mr. Broome's testimony whether Mr. Bates initiated this conversation spontaneously or whether Mr. Broome questioned Mr. Bates about the phone calls and murder.[11] Given these circumstances, I do not believe that this Court can ascertain whether Mr. Bates would have changed his version of the events when speaking to Mr. Broome. It is also uncertain whether Mr. Bates would have ever relayed information about these events if not for the impetus of the police.

Furthermore, it is unclear whether the jury would have convicted defendant without Mr. Broome's testimony regarding Mr. Bates' statements. The jury deliberated for two-and-a-half days and twice received a deadlocked jury instruction after informing the court that they could not reach a verdict. Although "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses,"[12] it is uncertain whether the jury would have found defendant guilty beyond a reasonable doubt based solely on the highly impeached testimony of Mr. Brooks. Mr. Brooks did not speak to the police until nineteen months after the murder. He gave several statements to the police before learning that Mr. Nino was already a suspect. Mr. Brooks then gave his final "truthful" statement implicating defendant and agreed to testify in exchange for an eighteen-year minimum sentence for his second-degree murder guilty plea. One week before defendant's trial, Mr. Brooks withdrew his guilty plea and claimed that he had lied to the court, only to reenter the same plea days later. Furthermore, Mr. Brooks admitted on the stand that, since the murder, he had been convicted of giving a false identification to the police several times.

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[9] *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980).

[10] *People v Washington*, 468 Mich 667, 671-672; 664 NW2d 203 (2003).

[11] Mr. Broome testified that he and Mr. Bates had several conversations about the telephone calls and the murder. On cross-examination, Mr. Broome testified that he asked Mr. Bates about the telephone calls. It is unclear from the record whether Mr. Broome questioned Mr. Bates or merely made an inquiry following an upsetting phone call to his friend and whether Mr. Broome questioned Mr. Bates about his role in the murder.

[12] *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

In light of the close evidentiary nature of this case, I cannot find that Mr. Bates' statements to Mr. Broome bore adequate indicia of reliability to be admitted into evidence. Therefore, I would find that their admission violated defendant's right to confront the witnesses against him. As I am not convinced that the jury would have convicted defendant without Mr. Broome's improperly admitted testimony, I would find that defendant is entitled to a new trial. Accordingly, I would vacate defendant's convictions and sentences and remand for a new trial without the improperly admitted evidence.[13]

II. Instructional Errors

Defendant also asserts that the trial court improperly failed to give an imperfect self-defense instruction and gave an erroneous accessory-after-the-fact instruction. I agree with the majority opinion that defendant was not entitled to an imperfect self-defense instruction. However, I disagree with the majority's conclusion that the erroneous accessory-after-the-fact instruction did not result in undue prejudice to defendant.

I agree with defendant that the instruction as given was unclear and misled the jury into believing that accessory after the fact is merely an alternative method of ascertaining guilt on an aiding and abetting theory. The majority correctly notes that a person may not be convicted of aiding and abetting in the commission of a crime based on his conduct as an accessory after the fact.[14] In *People v Lucas*, the Michigan Supreme Court found that the language "concerned in the commission of an offense" in MCL 767.39 precluded from aiding and abetting any acts of assistance amounting to accessory after the fact.[15] Although the trial court did not affirmatively instruct the jury, as in *Lucas*, that accessory after the fact was an alternative method of establishing that a defendant aided and abetted in the commission of a crime, the trial court's instructions did relay this message to the jury.

The trial court improperly inserted the accessory-after-the-fact instruction in the middle of the aiding and abetting instructions without any explanation to the jury that it represented a separate and distinct offense. This misplaced instruction confused the real message—that the jury could not convict defendant of the underlying charges based on an aiding and abetting theory if they only found him guilty of being an accessory after the fact. This instruction did not accurately represent the applicable law and likely confused the jury. The evidence regarding

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[13] Defendant also argues that, even if the jury could determine from the evidence that he was involved in planning the attempted robbery, the prosecution failed to present sufficient evidence to support his conviction for felony-murder. Specifically, defendant contends that the evidence reveals that the shooting was outside the scope of the common criminal plan and was the unforeseen result of an attempted robbery. As I would remand for a new trial in which certain evidence would be excluded, I do not see a need to determine whether the evidence in defendant's initial trial was sufficient.

[14] *People v Lucas*, 402 Mich 302, 304-305; 262 NW2d 662 (1978), citing *People v Wilborn*, 57 Mich App 277, 282; 225 NW2d 727 (1975).

[15] *Id.* at 305.

defendant's behavior following the murder was strong. However, the evidence of his preoffense behavior was based on the inadmissible testimony of Mr. Broome regarding Mr. Bates' statements and the highly impeached testimony of Mr. Brooks. Under these circumstances, it is very likely that the erroneous instruction affected the outcome of defendant's trial. Accordingly, I would find that defendant is entitled to a new trial.

/s/ Jessica R. Cooper